MOHAMED NAZRI ABDUL AZIZ

v.

ABU SAMAH HJ WAHAB & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: NO: 22-143-2002]
25 JANUARY 2005

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out - Whether claim disclosing prima facie reasonable cause of action - Whether an abuse of process - Rules of High Court 1980 O. 18 r. 19(1)*

CIVIL PROCEDURE: *Writ of summons - Renewal - Objection to extension - Objection grounded on alleged non-compliance with Rules - Whether strictly technical in nature - Whether to be dismissed - Rules of High Court 1980 O. 1, O. 2 r. 3, O. 6 r. 7(1), (2)*

The plaintiff in this case is a director of Bukit Rambai Development Sdn Bhd ('Bukit Rambai'). By a suit filed by the first defendant ('the first suit'), the first defendant *inter alia* claimed a sum of RM2,623,000 from the plaintiff, based on an oral guarantee purportedly executed by the latter. Subsequently, the solicitors of the plaintiff caused consent judgment to be entered in respect of the first suit. Dissatisfied, the plaintiff brought the instant suit, seeking a declaration that his solicitors in the first suit did not have the authority to enter into the consent judgment, and further, for the setting aside of the said judgment. In his pleadings, the plaintiff *inter alia* averred that the first defendant had breached an agreement and a supplemental agreement that he executed earlier with Bukit Rambai. This aside, the plaintiff also denied the allegation that he had executed any oral guarantee in favour of the first defendant.

The plaintiff could not serve the writ on time and so applied for and obtained two separate extensions thereof. The first defendant alleged that the extensions of time had been secured by way of false evidence, and in contravention of O. 6 r. 7(1) & (2) of the Rules of the High Court 1980 ('the RHC'), and hence, by encl. 58 herein, applied to set aside the extension orders in question. Further, the first defendant contended that the plaintiff's pleadings had disclosed no reasonable cause of action, and was tainted with abuse of process and *res judicata*, and in the circumstances, also applied to strike out the plaintiff's statement of claim pursuant to O. 18 r. 19(1) RHC.

Held (dismissing the application):

[1] Procedural objections grounded on non-compliance with the provisions stipulated in O. 6 r. 7(1) & (2) RHC are strictly technical in nature and ought to be disregarded unless such non-compliance has occasioned substantial miscarriage of justice. In this case, there was no submission by the first defendant that there was any substantial miscarriage of justice by reason of the non-compliance by the plaintiff's solicitors with O. 6 r. 7(1) & (2). In the circumstances, there was no merit in this ground put forward by the first defendant. (pp. 392 i & 393 a-b)

[2] It is only in conspicuously unsustainable cases that a pleading generally and a claim specifically ought to be struck out under any limb of O. 18 r. 19(1) RHC. In relation to the ground based on O. 18 r. 19(1), upon a proper perusal of the plaintiff's pleaded claim, the pleaded claim does present a *prima facie* reasonable cause of action against the first defendant. (p. 394 c-f)

[3] The plaintiff's claim in the instant suit is against, *inter alia*, the first defendant as a party in whose favour the consent judgment has been entered in the first suit, and that was the consent judgment the plaintiff is seeking to set aside in the instant suit. In the circumstances, the court is unable to hold that the pleaded claim is wholly unnecessary or irrelevant. Neither can it be said to be frivolous or vexatious in the sense of being obviously unsustainable. (p. 394 h)

[3a] There can also be no doubt that the plaintiff in the instant suit has a legitimate right to initiate and pursue his pleaded claim to seek an order to set aside the consent judgment. That being so, the first defendant's ground based on abuse of process under O. 18 r. 19(1)(d) must fall. (p. 395 a-b)

[4] For *res judicata* to apply, the *sine qua non* is that the claim must have been adjudged, resolved, decided or determined finally and conclusively. However, in this case, the issue pertaining to the setting aside of the consent judgment has never been adjudged by this court, and therefore, the doctrine of *res judicata* is clearly inapplicable. (p. 397 a-g)

Case(s) referred to:

Abu Samah Hj Wahab v. Bukit Rambai Development Sdn Bhd & Ors [2003] 4 CLJ 85 HC ***(refd)***

Arnold & Ors v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***
Datuk Ir Che Amran Mohd Yusoff v. Yayasan Melaka & Ors [2003] 1 CLJ 767 HC ***(refd)***
Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors [2003] 7 CLJ Supp 11 HC ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***
Mohktar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA ***(refd)***
Mooney & Ors v. Peat Marwick, Mithcell & Co & Anor [1967] 1 MLJ 87 HC ***(refd)***
Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466 CA ***(refd)***
Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 2 MLJ 324 FC ***(refd)***
S Manickam & Ors v. Ismail bin Mohamed & Ors [1997] 2 MLJ 90 ***(refd)***
Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and Anor, AIR 1960 SC 941 ***(refd)***
Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 2 rr. 3, O. 6 r. 7(1), (2), (2A), O. 18 r. 19(1)(a), (b), (d), (2)

For the plaintiff - Shahul Hameed Amiruddin (Tuan Syed Shafiq Alhabshi with him); M/s Zul Rafique & Partners
For the defendant No. 1 - Thara Singh Sidhu; M/s Thara Singh Sidhu

Reported by Rose Aziz

JUDGMENT

Low Hop Bing J:

Application

This is an application in encl. (58) filed by the first defendant for the following orders:

1. to set aside the order dated 9 August 2003 renewing the writ for six months from 2 March 2003 to 1 September 2003 ("the first extension order") and another order dated 23 September 2003 renewing the writ for further six months from 2 September 2003 to 1 March 2004 including the service of the writ on the first defendant;

2. to strike out the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 and under its inherent jurisdiction on the ground that:

   (a) it discloses no reasonable cause of action against the first defendant;

   (b) it is scandalous, frivolous or vexatious; and (a)

   (c) it is an abuse of the process of the court; and

3. costs on an indemnity basis be ordered and payable forthwith.

Factual Background

In an action based on an alleged breach of a written agreement and supplemental agreement entered into by the first and the second defendants ("Abu Samah" and "Bukit Rambai Development Sdn Bhd" respectively) Abu Samah commenced civil suit No. 22-67-1996 in the Melaka High Court ("the first civil suit") against, *inter alia*, the plaintiff ("Mohamed Nazri") as the first defendant in the first suit.

Mohamed Nazri had appointed Skrine & Co. to defend him in the first suit, for which a memorandum of appearance had been filed therein. Skrine 85 Co. subsequently discharged themselves as solicitors for, *inter alia*, Mohamed Nazri, as a result of which Hisham, Murthy, Saha & Associates ("solicitors HMS") were retained by, *inter alia*, Mohamed Nazri, through Chong Kok Hon (the second defendant in the first suit) being the person in charge of all matters pertaining to the first suit for, *inter alia*, Mohamed Nazri.

On 27 February 2001, solicitors HMS filed the notice of change of solicitors in place of Skrine & Co. and on the same date in the presence of one Mr. Krishnamurthy, learned counsel for, *inter alia*, Mohamed Nazri, and Mr. Thara Singh Sidhu learned counsel for Abu Samah in the first suit, consent judgment ("the consent judgment") was recorded before KN Segara J.

In the instant suit filed on 2 September 2002, Mohamed Nazri seeks a declaration that solicitors HMS who purportedly acted on behalf of Mohamed Nazri in the first suit and entered into the consent judgment did not have the authority to act on his behalf or to enter into the consent judgment and that the consent judgment be declared null and void, of no effect and be set aside.

Extensions Of Writ

Mr. Thara Singh Sidhu relied on O. 6 r. 7(1) and r. 7(2A) and submitted for Abu Samah that the two extensions of time for the writ in the instant suit had been procured by false evidence as Abu Samah was present in court at every hearing of the first suit before the learned registrar and before me, and

Abu Samah used to greet one of the learned counsel Tuan Syed Shafiz who appeared for Mohamed Nazri but who had never served the writ in the instant suit on Abu Samah, until 23 December 2003 ie, after a delay of 16 months and that the plaintiff's solicitor had resorted to the instant suit as a tactical manoeuvre.

Mr. Shahul Hameed Amirudin and Tuan Syed Shafiq Alhabshi, learned counsel for Mohamed Nazri contended that the procedural objections grounded on non-compliance with O. 6 r. 7(1) and r. 7(2A) are wholly and strictly technical in nature and sought support in my judgment in *Feedmeal Malaysia Sdn Bhd v. Teh Cho Yeow & Ors* [2003] 6 MLJ 19.

I shall first refer to O. 6 r. 7(1), r. 7(2) and r. 7(2A) which where relevant reads as follows:

> 7. Duration and renewal of writ (O. 6 r. 7)
>
> (1) For the purpose of service, a writ is valid in the first instance for [6] months, beginning with the date of its issue
>
> (2) Subject to para. (2A), where efforts to serve a writ on a defendant have been unsuccessful, the court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.
>
> (2A) An application for renewal must be made before the expiry of the writ, *ex parte* by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

At this juncture, it is useful for me to peruse the affidavit in support affirmed by Abu Samah in para. 6 (as translated) thereof in the following words:

> 6. My counsel, Mr. Thara Singh Sidhu, has briefed me on the liberal judicial wind' which is blowing and that one should not raise procedural technical objections -this has reference in the context of the Rules of the High Court O. 6 r. 7(1) and O. 6 r. 7(2A) that is to say the first extension obtained about a month before expiry and the 2nd extension was obtained 21 days after the expiry of the 1st extension.

Order 6 r. 7(1) and r. 7(2A) together with O. 1A and O. 2 r. 3 *vide* PU(A) 197/2002 had been considered by me in *Feedmeal Malaysia, supra*, wherein at p. 25F I held that procedural objections grounded on non-compliance with these provisions were strictly technical in nature and that in the light of O. 1A and O. 2 r. 3, a court or judge shall have regard to the justice of the

particular case and not only to the technical non-compliance unless such non-compliance has occasioned a substantial miscarriage of justice. There was no submission for Abu Samah that there was any substantial miscarriage of justice by reason of the non-compliance by Mohamed Nazri's solicitors with O. 6 r. 7(1) and r. 7(2A). In the circumstances, I am unable to find any merit on the basis of this ground put forward for Abu Samah.

Striking Out

It was submitted for Abu Samah that:

1. the pleaded claim in the instant suit shows parallel issues which have become non-issues and is caught by the doctrine of estoppel, *res judicata* and an abuse of process, in view of my judgment given in the first suit as reported in *Abu Samah bin Hj Wahab v. Bukit Rambai Development Sdn Bhd & Ors* [2003] 4 CLJ 85 ("my earlier judgment"); and

2. the whole cause of action in the instant suit is based on the issue that Solicitors HMS lacked authority to represent Mohamed Nazri and the relief claimed for the declaration is consequential upon Mohamed Nazri proving this issue, which has been demolished in toto and therefore the relief claimed to set aside the consent judgment falls to the ground.

For Mohamed Nazri, it was contended that:

1. the consent judgment was entered into, *inter alia*, against him without his knowledge, authority or consent in the first suit, and that it is necessary to name all the parties who were present and directly involved including Abu Samah when the consent judgment was recorded;

2. the issue whether Mohamed Nazri had given any authority to Solicitors HMS to act on his behalf and to have the consent judgment entered against him has never been considered by me in my earlier judgment; and

3. the issue of *res judicata* is wholly misconceived, being inapplicable to the facts of this case, because in my earlier judgment, I have not decided on the issue pertaining to the setting aside of the consent judgment.

I am of the view that it is only in conspicuously unsustainable cases that a pleading generally and a claim specifically would be struck out under any limb of O. 18 r. 19(1) and such power would only be exercised by the court sparingly: see eg. *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd* [1981] 2 MLJ 324 FC; *Datuk Ir. Che Amran, supra*, HC; *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co. Sdn Bhd.* [1987] 1 MLJ 413 HC; *Mooney & Ors v. Peat Marwick, Mithcell & Co & Anor* [1967] 1 MLJ 87 HC; *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor*

[1998] 3 CLJ 253 CA; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; *S. Manickam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90.

In my judgment, in relation to the ground based on O. 18 r. 19(1)(a) ie, that Mohamed Nazri's claim discloses no reasonable cause of action against Abu Samah, it is trite law that no evidence shall be admissible: O. 18 r. 19(2). I must therefore proceed to consider Mohamed Nazri's pleaded claim and the allegation of facts therein to see if a *prima facie* cause of action has been made out.

Upon a proper perusal of Mohamed Nazri's pleaded claim, it is abundantly clear to me that the claim is against, *inter alia*, Abu Samah, on the basis of an alleged breach of an agreement and supplemental agreement entered into between Abu Samah and Bukit Rambai Development Sdn Bhd dated 13 February 1990 and 27 July 1992 respectively. The claim had also pleaded that Abu Samah has filed the first suit against, *inter alia*, Mohamed Nazri, based on an allegation, which was denied, that Mohamed Nazri at the material time as a director of Bukit Rambai Development Sdn Bhd had given an oral guarantee, for which Solicitors HMS had caused a consent judgment to be entered against Mohamed Nazri in the sum of RM2,623,000 with interest and RM25,000 as costs, and that Abu Samah has threatened to carry the judgment into execution personally against Mohamed Nazri who has now in the instant suit sought to set aside the consent judgment.

The pleaded claim in my view does present a *prima facie* reasonable cause of action against Abu Samah, although I must immediately emphasise that the pleaded claim remains as mere averments which must be proved by way of evidence.

In the context of O. 18 r. 19(1)(b), the word "scandalous" means wholly unnecessary or irrelevant: see eg, *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; and *Datuk Ir Che Amran Mohd Yusoff v. Yayasan Melaka & Ors* [2003] 1 CLJ 767.

Mohamed Nazri's claim in the instant suit is against, *inter alia*, Abu Samah as a party in whose favour the consent judgment has been entered in the first suit, and that was the consent judgment Mohamed Nazri is seeking to set aside in the instant suit. In the circumstances, I am unable to hold that the pleaded claim is wholly unnecessary or irrelevant, neither can it be said to be frivolous or vexatious in the sense of being obviously unsustainable eg, where the wrong party is being sued, or the action is without merit or not justified: see *Boey Oi Leng, supra*; and *Datuk Ir. Che Imran, supra*. Indeed without deciding on the strength or weakness of the pleaded claim at this juncture, I am of the view that it is not scandalous, frivolous or vexatious.

I shall deal with the issue of *res judicata* later in my judgment.

Regarding Abu Samah's ground based on the abuse of the process of the court, under O. 18 r. 19(1)(d), there can be no doubt that Mohamed Nazri in the instant suit has a legitimate right to initiate and pursue his pleaded claim to seek an order to set aside the consent judgment. Whether or not he can or will succeed is an entirely different matter, for which I am unable to express any view at this stage, as the determination thereof must be based on evidence adduced and pursued to its logical conclusion.

Res Judicata

For the doctrine of *res judicata* or issue estoppel relied on by Abu Samah, *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 2 AMR 1457; *Arnold and Others v. National Westminster Bank Plc.* [1991] 2 AC 93; and *Mokhtar Bin Amin v. Mohamed Moktar bin Omar* (menggantikan Omar bin Mat Ziki @ Mohd Ziki, simati di bawah perintah) were cited in support thereof.

For Mohamed Nazri, it was contended that in my earlier judgment, the issue that I have considered did not pertain to the setting aside of the consent judgment and so *res judicata* or issue estoppel has no application.

On my part, I shall refer to the expressions "*res judicata*" and "issue estoppel" interchangeably.

Authorities abound in explaining what these expressions mean. It is enlightening to embark on a discussion of some of these authorities.

In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466, Mokhtar Sidin JCA in delivering the majority judgment of the Court of Appeal revisited this doctrine as expounded by the courts in India, England and Malaysia, where his Lordship referred to the position as explained by Peh Swee Chin FCJ (as he then was) in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 p. 791, as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *memo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel per *rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel per *rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

In *Hartecon, supra*, the Court of Appeal, through the judgment of Gopal Sri Ram JCA at p. 1467, referred to the judgment of Sharma J. at p. 76 in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 and the judgment of the Indian Supreme Court in *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and Anor*, AIR 1960 SC 941 which stated the law on the subject as follows:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because he appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

In the House of Lords decision in *Arnold, supra*, Lord Diplock at p. 104 stated as follows:

> Issue estoppel may arise whether a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue ... .

Parties are bound by the doctrine of *res judicata* from re-agitating an issue that had been resolved in earlier proceedings: *Mokhtar bin Amin, supra,* CA.

The above authorities have made it abundantly clear that for the doctrine of *res judicata* to apply the *sine qua non* is that the claim, cause of action or issue in question must have been adjudged, resolved, decided or determined finally and conclusively.

I shall now consider whether in my earlier judgment I have adjudged etc. the issue of setting aside the consent judgment so as to attract the application of the doctrine of *res judicata*. For this purpose, it is essential to state that in my earlier judgment, I have dismissed Mohamed Nazri's two appeals against the decisions of the learned registrar who had earlier dismissed with costs Mohamed Nazri's application in encl. (124) which sought an order to, *inter alia*, set aside the notice of change of solicitors in encl. (92) filed by solicitors HMS.

In my earlier judgment at p. 173, I had agreed with the decision of the learned registrar that the notice of change of solicitors was in good order as it was effected by solicitors HMS for and on behalf of, *inter alia*, Mohamed Nazri.

For avoidance of doubt, at p. 174A-B, I have specifically referred to the consent judgment and categorically stated as follows:

> Consent judgment
>
> None of the applications before the registrar and now none of the appeals before me contained any prayer for an order to set aside the consent judgment. I do not think I should express any view or write a judgment on this issue which would have to be ventilated in the other civil suit filed by the fourth defendant to set aside the consent judgment.

"The other civil suit filed by the fourth defendant" is the instant suit and the fourth defendant there is Mohamed Nazri, the plaintiff herein.

In the circumstances, there has been absolutely no doubt whatsoever that the issue pertaining to the setting aside of the consent judgment has never been adjudged etc. by me, in which case, I hold that the doctrine of *res judicata* is eminently inapplicable.

Conclusion

On the foregoing grounds, I hold that Abu Samah's application in encl. (58) is devoid of merits and is hereby dismissed with costs.